

Wage and Hour Division, Labor

§ 502.1

AUTHORITY: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.

SOURCE: 73 FR 77229, Dec. 18, 2008, unless otherwise noted.

EFFECTIVE DATE NOTE: At 74 FR 26008, May 29, 2009, part 501 was redesignated as part 502, and newly designated part 502 was suspended, effective June 29, 2009.

Subpart A—General Provisions

§ 502.0 Introduction.

These regulations cover the enforcement of all contractual obligation provisions applicable to the employment of H-2A workers under sec. 218 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA). These regulations are also applicable to the employment of United States (U.S.) workers newly hired by employers of H-2A workers in the same occupations as the H-2A workers during the period of time set forth in the labor certification approved by ETA as a condition for granting H-2A certification, including any extension thereof. Such U.S. workers hired by H-2A employers are hereafter referred to as engaged in corresponding employment.

§ 502.1 Purpose and scope.

(a) *Statutory standard.* Section 218(a) of the INA provides that:

(1) A petition to import an alien as an H-2A worker (as defined in the INA) may not be approved by the Secretary of the Department of Homeland Security (DHS) unless the petitioner has applied to the Secretary of the United States Department of Labor (Secretary) for a certification that:

(i) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(ii) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

(2) [Reserved]

(b) *Role of the Employment and Training Administration (ETA).* The issuance and denial of labor certification under sec. 218 of the INA has been delegated

by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL). In general, matters concerning the obligations of an employer of H-2A workers related to the labor certification process are administered and enforced by ETA. Included within ETA's jurisdiction are issues such as whether U.S. workers are available, whether adequate recruitment has been conducted, whether there is a strike or lockout, the methodology for establishing AEWR, whether workers' compensation insurance has been provided, whether employment was offered to U.S. workers as required by sec. 218 of the INA and regulations at 20 CFR part 655, subpart B, and other similar matters. The regulations pertaining to the issuance and denial of labor certification for temporary alien workers by the ETA are found in 20 CFR part 655, subpart B.

(c) *Role of the Employment Standards Administration (ESA), Wage and Hour Division (WHD).* (1) The Secretary is authorized to take actions that assure compliance with the terms and conditions of employment under sec. 218 of the INA, the regulations at 20 CFR part 655, subpart B, or these regulations, including the assessment of civil money penalties and seeking injunctive relief and specific performance of contractual obligations. *See* 8 U.S.C. 1188(g)(2).

(2) Certain investigatory, inspection, and law enforcement functions to carry out the provisions of sec. 218 of the INA have been delegated by the Secretary to the ESA, WHD. In general, matters concerning the obligations under a work contract between an employer of H-2A workers and the H-2A workers and U.S. workers hired in corresponding employment by H-2A employers are enforced by ESA, including whether employment was offered to U.S. workers as required under sec. 218 of the INA or 20 CFR part 655, subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals,

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and housing provided during the employment. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances impose penalties, recommend revocation of existing certification(s) or debarment from future certifications, and seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages (either directly from the employer or in the case of an H-2A Labor Contractors (H-2ALC), from the H-2ALC directly and/or from the insurer who issued the surety bond to the H-2ALC as required by 20 CFR part 655, subpart B and 29 CFR 501.8).

(d) *Effect of regulations.* The amendments to the INA made by Title III of the IRCA apply to petitions and applications filed on and after June 1, 1987. Accordingly, the enforcement functions carried out by the WHD under the INA and these regulations apply to the employment of any H-2A worker and any other U.S. workers hired by H-2A employers in corresponding employment as the result of any application filed with the Department on and after June 1, 1987.

§ 502.2 Coordination of intake between DOL agencies.

Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H-2A labor standards between the employer and the employee will be immediately forwarded to the appropriate WHD office for appropriate action under these regulations.

§ 502.3 Discrimination prohibited.

(a) No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(1) Filed a complaint under or related to sec. 218 of the INA or these regulations;

(2) Instituted or caused to be instituted any proceedings related to sec. 218 of the INA or these regulations;

(3) Testified or is about to testify in any proceeding under or related to sec. 218 of the INA or these regulations;

(4) Exercised or asserted on behalf of himself or others any right or protec-

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tion afforded by sec. 218 of the INA or these regulations; or

(5) Consulted with an employee of a legal assistance program or an attorney on matters related to sec. 218 of the INA, or to this subpart or any other Department regulation promulgated pursuant to sec. 218 of the INA.

(b) Allegations of discrimination against any person under paragraph (a) of this section will be investigated by the WHD. Where the WHD has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. The WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, and may recommend to ETA debarment of any such violator from future labor certification. Complaints alleging discrimination against U.S. workers and immigrants based on citizenship or immigration status may also be forwarded by the WHD to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices.

§ 502.4 Waiver of rights prohibited.

No person shall seek to have an H-2A worker, or other U.S. worker hired in corresponding employment by an H-2A employer, waive any rights conferred under sec. 218 of the INA, the regulations at 20 CFR part 655, Subpart B, or under these regulations. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the INA or these regulations shall be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the INA or these regulations. This does not prevent agreements to settle private litigation.

§ 502.5 Investigation authority of Secretary.

(a) *General.* The Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate and, in connection therewith,